

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

ROBERT M. MUDGE,

Plaintiff,

v.

THE SCOTTS MIRACLE-GRO COMPANY,

Defendant.

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CASE NO. 3:10-cv-402-JPG-SCW

MEMORANDUM AND ORDER

This matter comes before the Court on plaintiff Robert M. Mudge's response (Doc. 87) to the Court's November 22, 2011, order to show cause (Doc. 86) why the Court should not dismiss this case as moot based on the decision of the United States Court of Appeals for the Federal Circuit in *United States ex rel. FLFMC, LLC v. Wham-O, Inc.*, No. 2011-1067, 2011 WL 4952991 (Fed. Cir. Oct. 19, 2011). Mudge indicates that in light of the *Wham-O* decision and amendments to the false marking statute, *see* Pub. L. No. 112-29, § 16(b)(1)-(3), 125 Stat. 329 (2011) (codified at 35 U.S.C. § 292), he can put forth no good cause precluding dismissal of this case, but he requests dismissal without prejudice. Defendant The Scotts Company, LLC ("Scotts"), misnamed in the complaint as The Scotts Miracle-Gro Company, has replied to Mudge's response (Doc. 88) requesting that dismissal be with prejudice since Mudge's claim no longer exists as a matter of law.

Both parties agree that in light of the amendments to the false marking statute this case is now moot, and no further case or controversy exists between the parties. When a case is moot and no case or controversy continues to exist, the Court no longer has subject matter jurisdiction, *see Pakovich v. Verizon Ltd. Plan*, 653 F.3d 488, 492 (7th Cir. 2011), and without subject matter jurisdiction, it cannot adjudicate a claim on the merits, *see Murray v. Conseco, Inc.*, 467 F.3d

602, 605 (7th Cir. 2006); *Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004)

(“‘No jurisdiction’ and ‘with prejudice’ are mutually exclusive.”). “A court that lacks subject matter jurisdiction cannot dismiss a case with prejudice.” *Murray*, 457 F.3d at 605.

Because the Court does not have subject matter jurisdiction over this case, it must dismiss it without prejudice. The Court **DIRECTS** the Clerk of Court to enter judgment accordingly.

IT IS SO ORDERED.

Dated: December 21, 2011

s/ J. Phil Gilbert
Hon. J. Phil Gilbert